11.0 Alternatives

Preamble

As outlined under Scope B1(d) in the Task Force Terms of Reference, the Task Force has responsibility

> *to consider alternative methods of dealing with Indian and Metis people involved with the criminal justice system that take into account Indian and Metis cultures, languages and special needs, and to recommend changes that can be equitably and readily achieved to the existing system that take into account culture, languages and special needs of Indian and Metis people, particularly Indian and Metis youth.*

Alternative Approaches to Justice for Aboriginal People

The Terms of Reference include the specification that any recommendations made by the Task Force were to have regard for the present constitutional and legal framework in Canada and Alberta. On one hand, the scope of our Terms of Reference invited us to explore the concept of legal pluralism. On the other hand, the Terms restricted us to the constitutional and legal framework in Canada and Alberta. We agreed that the question of legal pluralism must be addressed by this Task Force. However, we have done so with some reservations. By means of block funding arrangements with a number of Bands, the federal government has given responsibility for education, social services, health and public works to some Band administrations. However, neither the federal nor the provincial government has recognized the Aboriginal desire for their own justice system.

The First Nations maintain that control of the criminal justice system as it applies to Aboriginals is a sovereign right of the First Nations. The Indian Association of Alberta stated in its Brief:

> *Prior to the signing of the Treaties, our ancestors had their own laws and maintained for themselves order in their societies. The Treaties confirm we have the authority and responsibility to maintain peace and good order among ourselves and on our lands. They solemnly confirm what already existed. The provisions to "maintain peace and good order between each other" in the Treaties, clearly recognizes and protects our rights to maintain peace and order in our communities. The Treaties do not take away or limit our right to keep our own forms of law and order among ourselves.*
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> *We always had those powers given to us by the Creator to our ancestors. We are not asking the Federal and Provincial Governments to give us any rights that we do not already have. The Federal and Provincial Government must recognize and affirm that such rights are stipulated in the Treaties, and that, in modern times, this includes the right to maintain our own system of peace and order.*[1]

The Indian Association of Alberta has reviewed a separate system of justice. The Association has put forth a recommendation for a pilot project implementing a separate justice system.

The Lesser Slave Lake Indian Regional Council suggested a gradual transition to an Indian Tribal Justice System. They stated:

> *The Lesser Slave Lake Indian Regional Council is proud of its track record, credibility it has built up over the years, and its vision of Indian control over their future as communities with a distinct identity, culture, language and aspirations. Among these aspirations, controlling their own free Tribal Justice System is a positive goal. However, the Regional Council is also aware of its current capabilities, and recognizes that a gradual transition to control is best achieved by making an impact within the existing system. To start slowly and gradually grow has been the pattern of the Regional Council...Our recommendations are designed to offer a first step on the road to the ultimate goal of a free Tribal Justice System within the region of the Lesser Slave Lake Indian Regional Council.* [2]

The Saddle Lake Band in Alberta, with the financial assistance of the Alberta Law Foundation created a Tribal Justice Research Centre to develop a model or a plan for a Tribal Justice System at Saddle Lake. The Band has drafted a Constitution which contains this model. The proposal acknowledges that certain offences and other matters must be referred to the existing justice system.

The Task Force commends the Saddle Lake Band for its initiative in developing the proposal. The model reflects the criteria emphasized in most of the Briefs we received from Aboriginals. These criteria include:

A. that the Tribal Justice System be an Aboriginal initiative;
B. that it be staffed and administered by members, and apply only to members;
C. that it adopt and codify Aboriginal ethics, traditions, and concepts of justice

The Chief of the Saddle Lake Band advised the Task Force that the tribal justice system has not yet been implemented only because it has not been possible to obtain the necessary funding. We see a great deal of merit in the Saddle Lake proposal and urge continued study on the possible implementation of the proposal on a pilot project basis.

The Task Force was concerned about the application of the Charter of Rights to the proposed system. We are uncertain of the right of a Band member to opt out of the tribal justice system. We are further concerned about the right of appeal to the existing court system.

Court Models for Aboriginals in Canada

We will address a number of alternative justice systems to deal with Aboriginal people which take into account Indian and Metis cultures, languages, and special needs. The first five models, some of which are discussed under courts, are based on the existing court system. They are clearly within the present constitutional and legal framework in Canada and Alberta. The sixth model requires federal legislation. The last model involves recognition of Indian sovereignty, which includes the right of Indians to have their own justice system in whichever way they choose to organize it.

A. The present system, with legally trained non-Aboriginal Judges usually sitting off Reserves and Metis Settlements.

B. An enhanced present system as above, with the addition of a sentencing panel consisting of two Aboriginal Elders or respected members of the Indian and Metis communities who would advise the Judge with respect to sentencing.

C. A partially indigenized present system. The present Canadian model with the addition of some Aboriginal Judges, Prosecutors, defence counsel and court staff.

D. An indigenized present system. The court would be totally composed of Aboriginals. Preferably, it would sit in areas which are predominantly Aboriginal. This court would be the only provincial court in the area and could also deal with non-Aboriginals. One court could operate in the Lesser Slave Lake Indian Regional Council area. Another similarly constituted court could operate in the area south of Calgary. This model would be most adaptable where there is a strong regional tribal council. The areas suggested are examples only. The Task Force is aware that there are other strong regional tribal councils. In areas with a concentration of Metis, a similarly constituted court could preside, which would be composed of Metis. The operation of such courts in urban areas presents a problem. However, the number of Aboriginals in Edmonton and Calgary exceeds the population of any Reserve or Settlement in Alberta, which would make it possible for such a court to function in the larger urban areas.

E. A system of lay Judges and Justices of the Peace courts. Judges of the Provincial Court are not required to be lawyers, although the Government has not appointed a non-lawyer to the Provincial Bench for about fifteen years. Lay Judges and Justices of the Peace would only be appointed after an intensive period of training and upon appointment, the lay Judge and Justice of the Peace would sit in court with the Provincial Court Judge for observation and training. These courts would be modelled on the present court system. The Justices of the Peace and lay Judge would be resident in the community or in the tribal area. The Justices of the Peace should have a dual appointment under Section 107 of the Indian Act and the Provincial Justice of the Peace Act. There would be an administrative limitation on their jurisdiction and they would be limited to the granting of bail, accepting guilty pleas to all provincial offences, trying specified provincial offences, accepting pleas and trying all federal summary conviction offences. Lay Judges or Justices of the Peace would be Indian or Metis. They would be given an intensive period of training and orientation with a Provincial Court Judge. They would preside in areas with a heavy concentration of Aboriginals. The Judge would be appointed under the Provincial Court Act, and would have all of the powers of a Provincial Court Judge. The purpose of having a lay Judge is to bring to the community a Judge who is familiar with Indian or Metis culture, traditions, and methods of dispute resolution.

F. A federally constituted Indian Court. This court would require the Government of Canada to engage Section 101 of the Constitution Act 1867 which confers jurisdiction on the federal government to "provide for the establishment of any additional courts for the better administration of the laws of Canada". Section 91 (24) of the Constitution Act 1867 gives the federal government broad authority over "both Indians and lands reserved for Indians." These sections, together with Section 35 of the Constitution Act, would provide that a Federally constituted Aboriginal Court be established. If Canada establishes such a Court, it could be given the jurisdiction to apply Aboriginal law practices and sanctions. This means that a federally constituted Indian Court could have jurisdiction on Indian Reserves. The jurisdiction of this Court would be limited in that it could only administer the laws of Canada. If Canada were to recognize the Aboriginal right of Indians to have their own Criminal Justice System, this court would be able to apply Indian law, Indian police practices, Indian court procedures and sanctions, and correctional systems which are sensitive to Indians.

As we recognize the possibility of the establishment of such a court, the Task Force is aware that a new level of courts, Judges, bureaucrats, and court staff would be created and that the cost would be significant. The Blood Tribe has urged the establishment of such a court to meet their aspirations. This court would complete the Blood Tribe's circle of government which now has executive and legislative branches but lacks a judicial branch.

G. An Aboriginal Justice System. The Indian Association of Alberta explained the legal basis for a First Nations justice system as follows:

First Nations of Treaty 6, 7 and 8 within Alberta have always held the right to manage and govern their own affairs. When they signed the Treaties with the Crown, they promised to uphold the laws of this country and respect the Treaties entered into between the parties. They reserved and kept for themselves, the right to maintain and uphold peace, law and order among themselves. The representatives of the Crown accepted this reservation and also promised to respect the rights described in the Treaties. This fundamental right to govern and regulate conduct among ourselves has been usurped and ignored by both Federal and Provincial governments in Canada, especially in matters involving the Criminal Justice System.

The political growth of First Nations has reached the point where many of our First Nations are now asserting the inherent right to self-determination which was never surrendered or given up in the Treaties.

As Justice Kirby presented his Report, "Native People in the Administration of Justice in the Provincial Courts of Alberta" in 1978, the political, legal and constitutional position of First Nations in Canada has changed dramatically.

Our Aboriginal and Treaty rights are now incorporated into the Constitution of Canada and Section 35 of the Constitution Act, 1982, which provides:

Section 35 (1) The existing Aboriginal and Treaty rights of original peoples of Canada are hereby recognized and affirmed.

Our legal rights have been recognized by the Supreme Court of Canada, which means several rulings with far-reaching implications. The Supreme Court of Canada rulings provide directions for the Federal and Provincial

governments to recognize, respect and uphold Indian, Aboriginal and Treaty rights. The Supreme Court decisions are a guide for the Federal and Provincial government's conduct in dealing with Indian First Nations.

The Indian First Nations Aboriginal and Treaty rights clearly include the right to make rules that govern conduct on our own lands and give us a say in how the laws of Canada affecting First Nations are to be enacted and enforced.[3]

Indian people in Alberta, as well as throughout the country, are increasingly calling for a parallel or separate justice system. Some view a separate justice system as a matter of inherent sovereignty. For others, it is a matter of right and for others again, it is a matter of Aboriginal Government. Sometimes, calls for a separate justice systems arise from cultural clashes and systemic discrimination. The Task Force believes that sovereignty addresses the authority to establish a justice system, but it does not address delivery. Secondly, the Task Force believes that sovereignty is a political issue and a matter to be settled at a constitutional level, rather than one to be explored by this Task Force. If and when the issue is settled, it will answer the question of who has the legal and constitutional authority to establish a justice system. However, the delivery system will not necessarily be different regardless of which government establishes the system.

Many organizations and individuals, including the Canadian Bar Association Native Law Subsection, hold that there is a sound constitutional basis for legal pluralism in Alberta and Canada. They are of the opinion that a system of justice for Indian and Metis people can exist within the Constitutional framework:

In the context of alternative native justice systems, we endorse the importance of legal pluralism within Canadian Confederation and recommend that priority should be given by governments in their allocation of criminal justice research funds to encourage the development as pilot projects of working models of contemporary native justice systems. We believe that there is a sound constitutional basis for the development of parallel native justice systems. We have, however, refrained from endorsing any particular model, because the particular model will be linked with an Indian nation's or native community's view of its path towards self-determination and ultimately it is for them to choose. It is not unrealistic to anticipate that models of aboriginal justice systems can be worked out in a Canadian context, which, cognizant of the experience of other jurisdictions, can reflect the accumulated wisdom of both aboriginal law ways and the common law. [4]

The Task Force acknowledges that the contrary view can exist.

The Task Force Recommends:

11.1 That we favour the view of the Canadian Bar Association Native Law Subsection. Whether an Aboriginal Justice System should exist and its scope and extent, is a matter for negotiation between the Indian and Metis people and the Governments of Canada and Alberta.

Diversion Policy

The Task Force has observed that tremendous expense and effort is allocated in the criminal justice system for processing Aboriginal people accused of minor offences involving provincial statutes such as the Liquor Control Act,

the Highway Traffic Act, and the Motor Vehicle Administration Act. The police, court and correction components of the system use their processes, administrative resources and programs such as the fine option program for dealing with offences which many do not consider to be criminal in nature. Legislative regulation of public conduct has seemingly increased to such an extent that almost all human activity is constrained to some degree by legislation and the risk of prosecution. Aboriginal people appear to be over-represented in many of these types of prosecutions. A clear example is the illegal possession of liquor. In some cases, these offences have little or no relevance to the community. Driving off-road vehicles on highways has been given as an example of an offence not considered serious in a remote Aboriginal communities. Many of these offences carry specified penalties of set fines. As we have noted, fines are inappropriate for poor people. We have also noted the frequently repeated concern that the criminal justice system is overburdened and taxed beyond its limit in all areas from policing to courts to corrections. To relieve this system of "minor" matters and to allow for some form of alternative disposition seems to be a worthwhile and attainable objective. Various suggestions have been made for achieving this goal. The Task Force has not had the time or resources to explore alternatives in any depth. However, we would be remiss if we did not identify some alternatives for further discussion and review by the Government of Alberta.

It has been suggested that de-criminalizing certain conduct or removing certain conduct from offence sections of legislation may be warranted. This is particularly so from the perspective of remote Aboriginal communities, where the offence sections may not reflect the community's sanction of particular conduct. We urge the Aboriginal community to communicate these concerns to elected officials. We also urge the Government of Alberta to be sensitive to cultural, geographic and other factors which may make some offences inappropriate in Aboriginal communities.

We have observed that the necessity to appear in court, personally or by agent, for all summary conviction offences except those which have specified penalties causes considerable hardship for Aboriginals who must travel a long way to court merely to enter a plea and have a trial date set. It has been suggested that a more streamlined process for entering appearances and pleas in court be developed by, for example, the use of a telephone, fax or other means of communication. Such methods may lighten dockets and minimize the inconvenience for Aboriginal accused persons and witnesses travelling to court only to be required to attend again at a later date. Our earlier suggestion that locally appointed Judges or Justices hear certain summary conviction offenses would help relieve the criminal courts of these administrative matters.

Although as yet relatively unused, diversion is perhaps the broadest method of allowing the community to deal with criminal conduct outside of the traditional prosecution route. The report of the 1988 Justice Reform Commission defines diversion as *"the name given to the programs which offer an alternative to prosecution under certain circumstances."*[5] The Young Offenders legislation provides for diversion schemes for young offenders. There is no equivalent legislation for adult offenders. However, even in the absence of such legislation, other provinces such as British Columbia employ diversion schemes for adults. Courts in Alberta also

routinely perform a kind of informal diversion at various stages.

It is our view that some Aboriginal communities are interested in becoming more involved in assisting the police, courts and corrections in priorizing resources with respect to certain kinds of criminal conduct. They are also interested in establishing more traditional dispute resolution and healing techniques – approaches which may in certain circumstances be viewed by both the community and the accused person as more effective than mainstream prosecution for dealing with criminal conduct. Diversion has often meant a commitment on the part of the Crown to not prosecute if diversion is deemed appropriate. Still, we are aware that diversion has taken the form of deferred sentencing after prosecution or even deferred prosecution after charges are laid. In these circumstances, the accused person obtains referrals to community resources in the interim period. Once the community resources have been employed and progress is made toward dealing with the problem in a manner satisfactory to both the community and the accused person, the decision to continue the prosecution or the decision to impose a nominal sentence is made. It has been reported in British Columbia, for example, that when a decision is made at the outset to decline to prosecute, very few accused persons fail to abide by the terms of the diversion agreement. We have reviewed the written material related to the British Columbia Diversion Plan. We have heard from Crown Prosecutors and Judges in Alberta who currently employ the informal manner of diversion. Based on discussions with Aboriginal communities, it has become apparent to us that any form of diversion must happen with the support and involvement of the local Aboriginal community. The diversion must also have the support of the police, courts and service agencies involved. Without the support of the community, diversion will be seen as the accused person "getting off." No meaningful support or assistance will then be given by the community to the accused person to correct the conduct. Without the support of the police and the courts, it will be difficult to change traditional charging and prosecution patterns. Without the support of social agencies involved in assisting the community and the accused person to correct the conduct, assistance programs will not be developed or priorized, or these agencies will fail to make current programs available to the diversion process while choosing to continue to give priority to court-directed intervention.

For these reasons we suggest that the Government of Alberta consider a pilot diversion project involving representatives of the local Aboriginal community, the police, a representative of the local defence bar and appropriate social service agencies. This diversion committee would, at the request of the community, police, lawyers, Crown Prosecutors or accused persons themselves, review the circumstances surrounding a charge or proposed charge to determine whether some form of diversion or attempt at diversion is appropriate.

During our work as a Task Force, we have reviewed literature that suggests the alternative methods for dispute resolution may be more culturally appropriate to Aboriginal communities than the adversarial methods used by the mainstream criminal justice system. Currently, there is no impediment, other than lack of training and education, to any Aboriginal community wishing to establish community mediation and arbitration mechanisms to deal with disputes on reserves or in settlements with

respect to land or band rights and including neighbour disputes, family related disagreements or other forms of conflict. We encourage communities to use this approach as either an alternative or a complement to the criminal justice system.

Although these alternate dispute resolution mechanisms may not be directly related to criminal conduct, they may serve to prevent criminal conduct. In certain circumstances, it may be appropriate for the diversion committee to refer an Aboriginal person accused of criminal conduct to community mediation or arbitration or to some other form of dispute resolution in the community before determining whether it is appropriate for the conduct to be dealt with through the criminal justice system proper. The Task Force has not had an opportunity to review alternative methods for the resolution of disputes in any depth or detail. However, it appears that the concept of relevant pilot projects in Aboriginal communities should be explored to determine the value of these programs as preventative and appropriate mechanisms for dealing with some forms of criminal conduct.

The Task Force Recommends:

11.2 **That the government develop a more streamlined process for entering appearances and pleas in court, perhaps by using the telephone, fax, or some other means of communication.**

11.3 **That Aboriginal communities become more involved in assisting the police, courts, and corrections in priorizing resources and in using more traditional dispute resolution and healing techniques.**

11.4 **That the Government of Alberta consider a pilot diversion project involving representatives of the local Aboriginal community, the police, lawyers, Crown Prosecutors, and accused persons to review the circumstances surrounding a charge or proposed charge to determine whether some form of diversion or attempt at diversion is appropriate.**

References

[1]The Indian Association of Alberta, "Submission to the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta," September, 1990. p8.

[2]The Lesser Slave Lake Indian Regional Council, "Submission to the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta," September 10, 1990, p8.

[3]The Indian Association of Alberta, "Submission to the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta," September, 1990.

[4]Canadian Bar Association (Alberta Branch), Native Law Subsection, "Submission to the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta," 1990.

[5]Justice Reform Commission, "Report," 1988.